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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 323

CLIFFORD VAUGHAN,
Petitioner,

VERSUS

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as Owners and/or Operators of the American SS "NATIONAL LIBERTY,"

Respondents.

PETITIONER'S BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia (R. 11-15) is reported at 1961 A. M. C. 2037. The Opinion of the United States Court of Appeals for the Fourth Circuit (R. 16-19) and dissenting Opinion of Chief Judge Simon E. Sobeloff (R. 20-29) are reported at 291 F. 2d 813 (1961).

II. JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on June 6, 1961 (R. 29-30). The Peti-

tion for a Writ of Certiorari was filed on August 16, 1961, and was granted on October 23, 1961 (R. 30). The jurisdiction of this Court rests on 28 U. S. Code, § 1254 (1).

III. QUESTIONS PRESENTED

1. Where a recalcitrant shipowner without cause refuses to pay a sick seaman the $8.00 per day maintenance unconditionally due him under his Union Contract, and the seaman, although not fit for duty, obtains light employment as a taxi driver, is the shipowner entitled to gain an advantage from his wrong and have the earnings of the sick seaman credited against the $56.00 weekly maintenance otherwise due?

2. Where a shipowner for twenty-three (23) months callously refuses to pay maintenance to a sick seaman, until after the seaman is forced to go to the trouble and expense of instituting suit and obtaining Court decrees for his maintenance — can the shipowner escape paying any damages to the seaman, other than six per cent interest, merely because the seaman eventually gets well?

IV. STATEMENT OF THE CASE

The facts in this case are undisputed (R. 16) and are contained in Findings of Facts numbered 1 through 10 of the District Court (R. 6-8) and Final Judgment Order (R. 9-10).

The Petitioner, Clifford Vaughan, a merchant seaman, earning the monthly base rate of wages of $315.20 *and* found, became ill of pulmonary disease while employed aboard the American SS NATIONAL LIBERTY. Upon being discharged from the SS NATIONAL LIBERTY on March 2, 1957, Vaughan was furnished by the vessel's Master with a certificate to enter the U. S. Public Health Service Hospital, at Norfolk, Virginia. He was examined at the hospital on March 7, 1957 as an out-patient. On March 18, 1957, he entered the hospital as an in-patient and remained

there until June 6, 1957, at which time he was discharged to out-patient status. Vaughan was given treatment at said hospital as an out-patient from June 6, 1957 until August 19, 1959. He was instructed to report back on August 25, 1957, when he was notified that he was fit for sea duty.

Article II, Section 13, of Petitioner's union contract provides (R. 26, footnote 8):—

"When a member of the unlicensed personel is entitled to maintenance and cure under Maritime Law, he shall be paid maintenance at the rate of $8.00 per day for each day or part thereof of entitlement. The payments due hereunder shall be paid to the man weekly. This payment shall be made regardless of whether he has or has not retained an attorney, filed a claim for damages, or taken any other steps to that end and irrespective of any insurance arrangements in effect between the Company and any insurer."

On June 6, 1957, the day he was placed on out-patient status, Vaughan sent the shipowner a registered letter, enclosing an abstract of his medical record from the U. S. Public Health Service Hospital, at Norfolk, and requesting payment of maintenance. Receiving no payment on account of maintenance, he then obtained a light job driving a taxi, while still undergoing out-patient treatment.

On January 5, 1959, Petitioner filed his libel in the District Court below, claiming maintenance and cure until he reached maximum medical recovery from his illness, and damages. In his claim for damages, Petitioner alleged: first, that through the unseaworthiness of the vessel and the negligence of the Respondents, he had contracted a chest disease believed to be tuberculosis, and, second, that he was entitled to damages because of the failure of the shipowner to pay him maintenance.

The Trial Judge below in his decision (R. 11-15), 1961 A. M. C. 2037, held that Respondent shipowner was derelict in its duty to pay Petitioner maintenance (R. 12) and awarded Petitioner maintenance at the rate of $8.00 per day provided

in his Union Contract, mitigated, however, by the net amount earned by Petitioner as a taxi driver, while an out-patient of the U. S. Public Health Service Hospital, at Norfolk (R. 13-14). The District Court awarded Petitioner interest at six per cent on the amounts it found to be due him from June 6, 1957, through August 19, 1959[1], but otherwise refused to award any damages, although it found that he was required to engage counsel in order to collect any maintenance whatsoever and that counsel fees were undoubtedly a diminution of the total amount which should have been paid him (R. 13-14). The District Court further held that Petitioner's illness was not caused by the unseaworthiness of the vessel or the negligence of Respondents.

A majority of a three Judge Court of Appeals affirmed the action of the District Court (R. 16-19) on the basis of *Wilson* v. *United States*, 229 F. 2d 277 (2nd Cir., 1956) and *Perez* v. *Suwanee S. S. Co.*, 239 F. 2d 180 (2nd Cir., 1956), with the Chief Judge dissenting. In his dissent, Chief Judge Sobeloff pointed out the majority Opinion was in conflict, in principle, with the decision of the United States Court of Appeals for the Third Circuit in *Yates* v. *Dann*, 223 F. 2d 64 at page 67, (3rd Cir., 1955), affirming 124 F. Supp. 125 (D.C. Del., 1954) on this point, but reversing the case on other grounds, the decision of the United States Court of Appeals for the Third Circuit in *Jones* v. *Waterman S. S. Co.*, 155 F. 2d 992 (3rd Cir., 1946), and the decisions of the United States Court of Appeals for the Second Circuit in *Evans* v. *Schneider Transportation Company*, 250 F. 2d 710 (2nd Cir., 1957) and *Bradt* v. *United States*, 221 F. 2d 325 (2nd Cir., 1955).

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1. The District Court awarded maintenance at $8.00 per day for the period March 7, 1957, through March 17, 1957, inclusive, and August 19, 1959, through August 25, 1959, inclusive, less "any sums earned by libellant during said period," *without interest*. (R. 9-10). Nothing was decreed for the period between March 2, 1957, through March 6, 1957.

V. ARGUMENT

POINT I. MAINTENANCE IS NOT DESIGNED TO RESTORE LOST EARNINGS. THE RIGHT TO MAINTENANCE SHOULD BE UNAFFECTED BY INCIDENTAL EARNINGS ASHORE WHILE THE SEAMAN IS A PATIENT UNDER TREATMENT, UNFIT TO DO SEAMAN'S WORK.

"Maintenance" is the value of the food and lodging due a seaman, who becomes sick or is injured in the service of the ship, while he is incapacitated to do seaman's work, and until he reaches maximum medical recovery.

> *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525 (1938); *Farrell* v. *United States*, 336 U. S. 511 (1949).

Distinction must be made between the concept of "maintenance" and the concept of "lost wages." "Lost wages" is an element of the damages recovered by the seaman if successful in a personal injury action against the shipowner. If, as here, the seaman does not prevail in his personal injury action (and does not therefore recover "lost wages"), there is no need to go into the question of "lost wages" at all and whatever the seaman might or might not earn is immaterial.

As pointed out by Chief Judge Sobeloff in his dissenting Opinion below (R. 25):

> **"The correct rule, I think, is to treat earnings during convalescence as wholly irrevelant, since Vaughan's right to maintenance and cure has been established in accordance with the governing Supreme Court decisions. See: *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525 (1938); *Farrell* v. *United States*, 336 U. S. 511 (1949). Here the earnings during convalescence should be treated as having no more relation to the right to maintenance and cure than the relief payments received by the seaman in another Second Circuit case, *Evans* v. *Schneider Transportation Company*, 250 F. 2d 710 (2nd Cir., 1957). This is not unlike the 'collateral source' rule recently applied by**

> us in *Price* v. *United States*, 288 F. 2d 448 (4th Cir., 1961), for Vaughan's earnings have no more to do with maintenance and are as collateral to maintenance as the civil service benefits were to damages in that case, or the insurance in *United States* v. *Brooks*, 176 F. 2d 482 (4th Cir., 1949). Whether an employer's breach of its duty to provide maintenance throws the seaman on public relief or forces him to work while ill and still in need of treatment, the employer should not gain an advantage from his wrong. *Maintenance is not designed to restore lost earnings*, and the right to maintenance should be unaffected by incidental earnings ashore while the sailor is a patient under treatment and unfit to do seaman's work.
>
> True, in a suit under the Jones Act only such wages may be recovered as the plaintiff has lost by reason of the injury, but this is not such a suit." (Emphasis supplied and footnotes omitted).

This is also the view of the Court of Appeals for the Third Circuit in the case of *Yates* v. *Dann*, 223 F. 2d 64, at page 67, (3rd Cir., 1955) where that Court (reversing the District Court on other grounds) expressly approved the holding of the District Court, (124 F. Supp. 125, 140 (D. C. Del., 1954), that a seaman is not be penalized where he had not been discharged as an out-patient and should have been receiving maintenance, but where the shipowner withheld maintenance payments and the seaman returned to work while still under out-patient treatment by the Public Health Service. Although earnings were permitted to mitigate the wages payable as part of his damage award, his right to maintenance and cure was held to continue during the period in which he, as an out-patient, was engaged in such work, undiminished by any earnings in that period.

Similarly, in *Jones* v. *Waterman S. S. Co.*, 155 F. 2d 992 (3rd Cir., 1946), an injured seaman was permitted to recover maintenance and cure from his employer, although in a previous action against a third party tortfeasor, which ended in settlement, he had sought to recover damages which included "substantially all the items recoverable by Jones as maintenance and cure and wages." 155 F. 2d at page 995. See also discussion at page 996.

In *Evans* v. *Schneider Transportation Company*, 250 F. 2d 710 at page 712 (2nd Cir., 1957), the United States Court of Appeals for the Second Circuit awarded the estate of a tubercular seaman full maintenance for a six month period during which the seaman had received municipal relief.

In *Bradt* v. *United States*, 221 F. 2d 325, at page 326 (2nd Cir., 1955), the Court of Appeals for the Second Circuit held that a tubercular seaman was entitled to full maintenance during the period he was attending a maritime school on a full time basis.

In *Hanson* v. *Reiss Steamship Co.*, 184 F. Supp. 545, 550 (D. C., Del., 1960), an injured seaman who had obtained employment on a fur farm while an out-patient was awarded maintenance for the period of such employment.

Thus the principle of mitigation of damages is not applicable. The instant seaman's recovery is solely for maintenance,[2] *not* wages, and except for the free food and lodging provided him in the U. S. Public Health Service Hospital, the shipowner is liable for these items.

Cf. 47 Virginia Law Review 1077, at pages 1082-1083, commenting on the decision below;

Also Cf. Norris, *The Law of Seamen*, Vol. 2, page 133.

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2. The principles applicable here appear to be similar to those involved in *Batchelor* v. *American Health Insurance Company*, 107 S. E. 2d 36 (1959). There the plaintiff was insured under ten different hospital expense policies and the insurer pointed to the fact that the plaintiff earned $65.00 per week, whereas if hospitalized, he would receive, under the various policies, $754.00 per week. The Supreme Court of South Carolina held that the plaintiff was entitled to the proceeds of the policies, although under the circumstances it was more profitable for him to become hospitalized than to be gainfully employed.

Similar reasoning has allowed seamen injured in bus accidents to recover full maintenance, although they had made recovery against the bus companies for full damages, including cost of medical care and maintenance. *Gaynor* v. *United States*, 90 F. Supp. 751 (E.D. Pa., 1950); Cf. *Gomes* v. *Eastern Gas & Fuel Associates*, 127 F. Supp. 435 (D.C. Mass., 1954).

The error of the majority Opinion of the Court of Appeals below is ably analyzed by Chief Judge Sobeloff in his dissent (R. 23-25):

> ". . . *Wilson* v. *United States*, 229 F. 2d 277 (2nd Cir., 1956), is different from our case. Wilson obtained work as a relief engineer on ships in port, doing much the same work he had done for the defendant. Unlike the *Wilson* case, there is no intimation here that Vaughan was fit for work on a vessel at anytime before August, 1959. Moreover, the language of the *Wilson* case, which is made the premise of the majority opinion that 'maintenance and cure lies on the borderline between 'contract' and 'quasi-contract' and is sufficiently contractual so that the seaman has the duty to mitigation damages' (sic) is in dire conflict with the opinion of Justice Cardozo in *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367 (1932), and with the holding of the Third Circuit in *Sims* v. *United States of America War Shipping Adm'n.*, 186 F. 2d 972 (3rd Cir., 1951), cert. den. 342 U. S. 816, where Judge Goodrich said:
>
> > 'This obligation for maintenance and cure is, as Mr. Justice Cardozo says, 'imposed by the law itself as one annexed to the employment * * * . The duty * * * is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties.' Cortes v. Baltimore Insular Line, 1932, 287 U. S. 367, 371-372, 53 S. Ct. 173, 174, 77 L. Ed. 368. It is no more a contract than the obligation of a husband to support his wife is one of contract. Each arises out of a relationship voluntarily entered into. But these duties are imposed by the law as an incident to the relationship, not a matter of contract. We do not think, therefore, that the usual rules of damages for breach of contract to pay money are applicable.' 186 F. 2d at page 974.
>
> See also Gilmore and Black, The Law of Admiralty, page 257.
>
> The opinion of this court, like that of the court in *Wilson*, assumes that what is involved here is an ordinary contract, that the relief sought is damages for a breach of contract and that the rule of mitigating damages ap-

plies. This is at variance with the above language of Justice Cardozo speaking for the Supreme Court. The action for maintenance and cure is not one for damages. See *Pacific Co.* v. *Peterson*, 278 U. S. 130, 136-139 (1928). See also *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730-731 (1943).

The other Second Circuit case upon which the majority relies is *Perez* v. *Suwanee S. S. Co.*, 239 F. 2nd 180 (2nd Cir., 1956). There the Court sets off against maintenance a convalescing seaman's earnings from employment as a dishwasher, but ignores the dissimilarity of the work and the incapacity of the plaintiff to perform as a seaman—the features it had been at pains to point out in the *Wilson* case.

The theory of the Perez case is, I submit with deference, contrary to the spirit and doctrine of maintenance and cure which is deeply rooted in the admiralty law. See: *Harden* v. *Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C.C.D. Me., 1823); *Reed* v. *Canfield*, 20 Fed. Cas. 426, Case No. 11, 641 (C.C.D. Mass., 1832). Moreover, the course of decision in the Second Circuit strongly suggests that that Court has not yet spoken its final word on this point. See *Reardon* v. *California Tanker Company*, 260 F. 2d 369 (2nd Cir., 1958). . . . "

POINT II. WHERE A SHIPOWNER FOR TWENTY-THREE (23) MONTHS CALLOUSLY REFUSES TO PAY MAINTENANCE TO A SICK SEAMAN, FORCING THE SEAMAN TO GO TO THE TROUBLE AND EXPENSE OF INSTITUTING SUIT AND OBTAINING A COURT DECREE FOR HIS MAINTENANCE, THE SHIPOWNER CANNOT ESCAPE PAYING DAMAGES MERELY BECAUSE THE SEAMAN EVENTUALLY GETS WELL.

As Chief Judge Sobeloff noted in his dissenting Opinion below (R. 28):—

"He (the shipowner) should not be permitted and emboldened to act unilaterally, denying maintenance to

> one under treatment as an out-patient. If, despite his awareness that the right to maintenance exists, the employer elects to ignore his plain legal duty, the Court should not tell him that he may do so with impunity, even with possible gain. The shipowner is not entitled to assurance that if his pressure on the seaman fails the shipowner will suffer no disadvantage, while if it succeeds he will harvest the fruits of the sick man's labor though it may visit upon that man serious hardship short of demonstrated aggravation of the illness." (Words in parenthesis added).

It is submitted that failure to furnish maintenance when due gives rise to a cause of action in damages whether or not it is satisfactorily demonstrated that such failure aggravated the condition of the sick seaman.

The Troy, 121 F. 901, 906 (W.D. N.Y., 1902);
Ran v. *Atlantic Refining Co.*, 87 F. Supp. 853 (E.D. Pa., 1949).

In the instant case the Petitioner was forced to go to the trouble and expense of instituting suit and obtaining judgment before he could obtain one penny of the specific weekly maintenance due him, during a period extending over twenty-three (23) months. Petitioner should certainly be allowed as damages the amount he was required to pay for attorney's fees in order to recover at last the maintenance due him.

The Apollon, 9 Wheat. 373, 379 (1824);
Cf. *Sprague* v. *Ticonic Bank*, 307 U. S. 161 (1939), footnote 2;
American Jurisprudence, Vol. I, Admiralty § 139;
Also Cf. Footnote 3 of the dissenting Opinion below (R. 21-22).

VI. CONCLUSION

Concluding his dissent below, Chief Judge Sobeloff said (R. 28-29):

> "In summary, I find no sufficient warrant for a rule that rewards an owner's recalcitrance by automatically crediting him with earnings from part-time work ashore to which a sick man may be driven by the goad of hunger. Inevitably such a holding will serve as an inducement to owners, not only in doubtful cases, but even where, as here, no question was or could be raised as to the right to maintenance, to exert economic pressure on seamen to force them to work regardless of consequences to health. This could not be squared with what Justice Stone, citing many cases, called 'the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards.' *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 529 (1938).
>
> If the rule of *Yates* v. *Dann, supra*, enunciated by the Third Circuit, is considered defective in permitting a sick or injured man to retain sums he has earned during convalescence when maintenance was admittedly payable but not paid, it is certainly a lesser defect than that embodied in the competing rule of the Second Circuit, which by turning such earnings over to a defaulting employer who presents no excuse for his default, offers temptation to other employers to practice delay and harshness." (Footnotes omitted).

WHEREFORE, Petitioner respectfully prays that the Judgment of the Court of Appeals below be reversed.

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